Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action	WC Docket No. 04-245

COMMENTS OF CBEYOND COMMUNICATIONS, LLC, CTC COMMUNICATIONS CORP., EL PASO NETWORKS, LLC, MCLEOD TELECOMMUNICATIONS SERVICES, AND TDS METROCOM, LLC.

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Table of Contents

SUMMARY

Cbeyond Communications, LLC, CTC Communications Corp., El Paso Networks, LLC, McLeod Telecommunications Services, and TDS Metrocom, LLC. request that the Commission deny BellSouth Telecommunication, Inc.'s Emergency Petition For Declaratory Ruling and Preemption of State Action ("Petition"). Bellsouth's Petition should be readily rejected for two primary reasons. First, state commissions have the authority to set prices in accordance with the Commission's just and reasonable standard for 271 UNEs. Contrary to BellSouth's claims, the Commission does not have sole jurisdiction to regulate 271 UNEs and the Tennessee Regulatory Authority ("TRA") is not precluded from acting pursuant to section 271. Indeed, states have the authority to regulate pursuant to this section so long as their actions are consistent with the Commission's regulatory framework. Such authority is supported by section 271 of Act and numerous Commission orders that specifically acknowledge and rely on significant state commission involvement in the section 271 process. This state involvement includes establishing rates, terms, and conditions for 271 UNEs that are based on and consistent with the standards specifically chosen by the Commission. Because the TRA adopted such a rate for the switching 271 UNE, the TRA's actions do not thwart or frustrate existing Commission policy but rather encourage and facilitate the implementation of it. The TRA therefore has the authority to act as it did.

Second, the Commission cannot preempt states from exercising their intrastate authority over 271 UNEs which are in themselves local intrastate services. The Act has long recognized dual state and federal regulation over telephone service in which the Commission regulates interstate communications and states regulate intrastate communications. Section 271 does not alter that dual regulatory scheme and does not strip the authority of state commissions to regulate

intrastate services that include 271 UNEs. Nor does the Commission's adoption of the just and reasonable standard associated with sections 201 and 202 (which normally only applies to interstate services) for 271 UNEs permit the Commission to exert exclusive interstate jurisdictional control over them. For these reasons, the TRA did not exceed its authority and was acting fully consistent with the Commission's policy, directives, and regulatory framework established to implement the Act.

For these reasons, the Commission should deny BellSouth's Petition and not preempt the order of the TRA. In rendering this decision, the Commission should hold that state commissions have the authority to establish rates, terms and conditions for 271 UNEs that are consistent with the Commission's just and reasonable standard.

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INTRODUCTION

Cbeyond Communications, LLC, CTC Communications Corp., El Paso Networks, LLC, McLeod Telecommunications Services, and TDS Metrocom, LLC. (Commenters) hereby respectfully submit comments in response to the Commission's request for comment in the above-captioned docket on the Emergency Petition for Declaratory Ruling and Preemption of State Action ("Petition") that was filed by BellSouth Telecommunications, Inc. ("BellSouth") on July 1, 2004.

In its Petition, BellSouth argues that a state commission has no authority to establish rates for Unbundled Network Elements ("UNEs") provided under section 271 because the Communications Act of 1934 as amended by the Telecommunications Act of 1996 ("the Act") and the Commission's *Triennial Review Order* only grants the Commission the authority to do so. BellSouth requests that the Commission issue a order declaring that states have no jurisdiction over UNEs that Bell Operating Companies ("BOCs") must provide pursuant to section 271 ("271 UNEs") and preempt a recent order of the Tennessee Regulatory Authority ("TRA") that established a "market rate" for section 271 switching. As demonstrated below, Bellsouth's Petition should be denied readily because (1) state commissions have the authority to

set prices in accordance with the Commission's just and reasonable standard for 271 UNEs, and (2) the Commission cannot preempt states from exercising their intrastate authority to do so. Therefore, the TRA did not overstep its authority and was acting consistent with the Commission's policy, directives, and regulatory framework established to implement the Act.

BACKGROUND

Section 271 of the Act sets forth the requirements a BOC must meet before it may enter the interLATA toll market in a state. Section 271(c)(2)(B) includes a "competitive checklist" of 14 measures which were intended to ensure that the BOC had opened the local exchange market to competition. Checklist Item No. 2 requires nondiscriminatory access to UNEs in accordance with the requirements of sections 251(c)(3) and 252 (d)(1) (otherwise referenced herein as "251 UNEs"). Section 251(c)(3) requires ILECs to provide such UNEs, while section 252(d)(1) sets the pricing standard for those UNEs (which is based on Total Element Long Run Incremental Cost ("TELRIC") pricing). Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to 251 UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard. Thus, Checklist Item No. 2 requires a BOC to meet all of the 251 and 252 unbundling and pricing standards, which the Commission limited in the *TRO*[1] to specific types of loops, subloops, transport, and switching.

Under section 271(c)(2)(B), checklist Items Nos. 4, 5, 6, and 10 specifically require BOCs to offer unbundled access to loops, transport, switching and signaling ("271 UNEs").

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, (2003) ("*Triennial Review Order*" or "*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order Errata*"), *aff'd, rev'd, and vacated in part sub nom., United States Telecom. Ass'n v. F.C.C.,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

These conditions are separate and apart from a BOCs obligation to comply with checklist item 2 and provide 251 UNEs at TELRIC prices. To elaborate, the Commission has explicitly found that despite elimination of a number of UNEs under section 251, BOCs must continue to provide access to those UNEs under section 271. However, unlike Checklist Item No. 2, none of these other checklist items cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the Commission in the *TRO*, UNEs offered under Checklist Items Nos. 4, 5, 6 and 10 must only meet the "just and reasonable" pricing standard of 47 U.S.C. §§ 201-202 and not the TELRIC pricing standard required under section 252.

In rendering this decision, the Commission found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[2] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Act empowered the Commission to adopt rules that implement the Act, the Commission held that the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Act should be applied to 271 UNEs. The Commission further held that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[3]

In its March 2004 decision in *USTA II*, the D.C. Circuit affirmed the Commission's finding that the pricing standard for UNEs that must be offered pursuant to section 271 is found in sections 201 and 202 of the Act and not section 251. Specifically, the court upheld the Commission's determination that TELRIC pricing was not required under section 271 and stated that prices not be "unjust, unreasonable or discriminatory."[4]

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2 *TRO* at ¶ 656.

3 *TRO* at ¶ 664.

4 *USTA II,* 359 F.3d at 589.

As to state commission jurisdiction under section 271, section 271(d)(2)(B) requires that the Commission consult with the relevant state commission regarding a BOC's compliance with 271(c) conditions before granting a BOC's 271 application. In the Commission's orders granting such applications,[5] the Commission acknowledged that it worked closely with the state commissions and intended to monitor closely a BOC's post-approval compliance to ensure that the BOC does not "cease [] to meet any of the conditions required for [section 271] approval."[6] The Commission recognized the important role that state commissions would play in enforcing the requirements of section 271 and stated:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[7]

In the *New York 271 Order* (which was cited in the *Kansas/Oklahoma 271 Order*), the Commission specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The Commission stated that:

> Complaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance

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[5] *See, e.g., In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee,* WC Docket No. 02-306, Memorandum Opinion and Order, FCC 02-331, 17 FCC Rcd 25828, ¶¶ 5 & 182 (rel. Dec. 19, 2002) ("*Tennessee 271 Order*").

[6] *Tennessee 271 Order,* ¶ 182.

[7] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, 16 FCC Rcd 6237, ¶ 285 (rel. Jan 22, 2001) ("*Kansas/Oklahoma 271 Order*") (emphasis added), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[8]

With these decisions and numerous other Commission 271 decisions, the Commission explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, Performance Assurance Plans (PAPs).

ARGUMENT

I. State Commissions Have the Authority to Set Rates, Terms, and Conditions for 271 UNEs in a Manner that is Consistent with the Commission's Regulatory Framework.

Contrary to BellSouth's contentions, the Commission does not have exclusive jurisdiction to regulate 271 UNEs and the TRA is not prohibited from acting pursuant to section 271. States have the authority to regulate under this section so long as their actions comport with the Commission's regulatory scheme. In addition, such authority is supported by section 271 of Act and Commission decisions that specifically contemplate that state commissions will be involved heavily in the section 271 process. This state involvement includes establishing rates, terms, and conditions for 271 UNEs that are based on and consistent with the standards chosen by the Commission. Because the TRA adopted such a rate for the switching 271 UNE, the TRA's actions do not thwart or frustrate existing Commission policy but rather encourage and facilitate the implementation of it. For these reasons and as discussed further below, the TRA has the authority to act as it did.

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[8] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, 15 FCC Rcd 3953, ¶ 452 ("*New York 271 Order*"). In the *New York 271 Order,* the Commission noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order." *New York 271 Order* at n.1353.

A. The Act, as Implemented by the Commission, Permits Having States Establish Rates, Terms and Conditions for Section 271 UNEs that are Consistent with the Commission's Regulatory Framework.

1. Congress Did Not Intend to Occupy Section 271 Exclusively and Under Long Standing Preemption Principles, States Have the Authority to Regulate Under This Section So Long As Their Actions Are Consistent with the Prescribed Federal Policy.

As detailed above, BOCs currently have an independent obligation under section 271 to provide access to loops, switching, transport and signaling, *i.e.*, 271 UNEs, regardless of whether the CLECs are impaired without access to such elements pursuant to section 251.[9] BellSouth incorrectly claims that section 271(d) vests the Commission with the sole authority to regulate 271 UNEs.[10] Contrary to these contentions, Congress never explicitly stated in section 271 that states lack the authority to regulate in this area in accord with the established federal framework. If Congress intended to preclude or limit such state authority, Congress would have unambiguously and straightforwardly said so in section 271 of the Act. In other sections of the Act, Congress has been specifically clear when it extends its exclusive jurisdiction over areas traditionally held by the states[11] and when it has limited state commission involvement under the Act.[12] Section 271 is, however, silent regarding a state's authority. But this silence, does not

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[9] *See TRO*, ¶ 653.

[10] BellSouth Petition at 7.

[11] *See, e.g.*, 47 U.S.C. § 276 (b)(1)(A)(requiring that the Commission establish a interstate and intrastate payphone compensation plan); 47 U.S.C. § 276(b)(1)(B) (ordering the Commission to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A)"); 47 U.S.C. § 251(b)(2) (establishing "[t]he duty to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission").

[12] *See., e.g.*, 252(b)(4) (specifying state commission actions during a 252 arbitration); 252(d)(1) (specifying the state commissions obligations when establishing rates for 251(c)(2) and (3) facilities and equipment),

mean that states are preempted from regulating in this area.

Rather, under long-standing federal preemption principles, states are entitled to regulate when there is such statutory silence so long as the state actions are consistent with the established federal regulatory scheme. Under these principles, a federal agency can only preclude state action if the federal agency, in adopting the federal policy, determines that state actions would thwart or frustrate that policy.[13] In this case, state commission action that applies the Commission's just and reasonable standard to determine rates, terms and conditions for 271 UNEs does not frustrate or thwart that policy. Rather, such state action promotes and facilitates the implementation of it. Therefore, so long as such state involvement is in concert with the Commission's section 271 regulatory framework, such state action is permissible and by law, cannot be preempted.

2. The Commission's Plea for and Reliance on State Commission Involvement in the Section 271 Process Supports Permitting State Action Under Section 271.

Before a section 271 application can be granted, section 271(d)(2) requires that the Commission consult with the relevant state commission in order to verify the BOC's compliance with the requirements of section 271(c). The Commission has long recognized the "critical statutory role" state commissions play in the section 271 authorization process and has specifically stated that,

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[13] *TRO* para. 192 (citing, *inter alia*, *Geir v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause); *see TRO* at n.613 (citing *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."); *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta,* 458 U.S. 141, 154 (1982) (even where Congress has preserved some role for the states the Supreme Court has found that "state law is nullified to the extent that it actually conflicts with federal law." The Court stated that such a "conflict" arises ". . . when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz,* 312 U.S. 52 (1941).").

> We encourage state commissions to become actively involved in validating and reconciling data, overseeing third-party testing of operations support systems, developing clearly-defined performance measures and standards, and implementing performance assurance measures that strongly encourage post-entry compliance. Indeed, given our 90-day statutory deadline, this Commission looks to state commissions to resolve factual disputes wherever possible. As indicated in prior section 271 orders, this Commission will accord more weight to state commission evaluations where the state has conducted a rigorous investigation of the BOC's compliance with the statutory requirements through an open, collaborative state process that allows full participation by all interested parties, and has supported its evaluation with a detailed record.[14]

In this role, the Commission expects that state commissions will make written factual findings and reach reasoned legal conclusions concerning the BOC's compliance with the requirements of section 271. These findings and legal conclusions guide the Commission's review of a BOC's section 271 application and assist the Commission in determining whether to grant the application.[15] Although the Commission makes the ultimate finding of compliance, it relies heavily upon the work of state commissions. After the application is granted and as previously noted, the Commission has specifically recognized the authority of state commissions to enforce the requirements of section 271-related commitments, which includes, but is not limited to, enforcing state related commitments and PAPs.[16]

Given this and hypothetically speaking, if the Commission were to review a BOC's

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[14] Public Notice, Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, 16 FCC Rcd 6923, at 6930 (Mar. 23, 2001) (citing *New York 271 Order*, 15 FCC Rcd at 3973-74, ¶¶ 51, 54; *see also id.*, 15 FCC Rcd at 3957-59, ¶¶ 6-12 (describing efforts of the New York Public Service Commission); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18357-59, ¶¶ 3-4 (describing efforts of the Texas Public Utility Commission)); *see also Tennessee 271 Order*, ¶ 5.

[15] Public Notice, Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, 16 FCC Rcd 6923, at 6930 (Mar. 23, 2001).

[16] *Oklahoma/Kansas Order*, ¶ 285; New York 271 Order, ¶ 452; *Tennessee 271 Order*, ¶¶ 181-82.

section 271 application when the BOC was not compelled by section 251(c)(3) to offer loops, transport, switching, and/or signaling, the Commission would expect a state commission to establish just and reasonable rates, terms, and conditions for such facilities under section 271. Thus, state commissions would not be acting without authority in doing so. Rather, state commissions would be complying with the Commission's explicit directives that it be done.

Not only that, but even after a section 271 application is approved, section 271 does not prohibit a state commission from investigating certain aspects of a BOC's compliance with the section 271 conditions. Conceivably, a state commission may wish to do this as an interim measure to determine if a formal complaint should be filed with the Commission concerning a BOC's failure to meet a certain section 271 condition. Such an investigation may include determining whether a BOC's 271 UNE offerings are just and reasonable.

Although the Commission did state in the *TRO* that it would review rates for 271 UNEs in the context of section 271 applications and enforcement proceedings, the Commission did not specifically preclude state commissions from establishing such rates. Indeed, it makes both procedural and substantive sense to allow state commissions, who are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to apply the Commission's just and reasonable standard for 271 UNE offerings.

Significantly, a number of other considerations support a state commission's authority in this regard. First, it makes perfect sense if the state commission is applying the Commission's "just and reasonable" standard. Significantly, most state commissions have considerable experience in applying this standard to the rates of BOCs and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an BOC's claim that its 271 UNE offerings are just and

reasonable. Finally, both CLECs and the National Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, that the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[17] clearly establish that states, not the Commission, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[18]

These same parties also point to a state commission's authority to arbitrate and approve interconnection agreements pursuant to section 252 as another source of authority to set rates for elements provided pursuant to section 271.

For these reasons, the state commissions have the authority to establish rates, terms, and conditions for 271 UNEs that track the applicable federal requirements.[19] The Commission should recognize that if a party believes the state commission has applied an incorrect standard, the party may then file an action with the Commission pursuant to section 271(d)(6) and the Commission will have the benefit of considering the state commission's detailed factual record. Nothing about a state commission's review of a BOC's 271 UNE offerings preempts or quashes the Commission's authority under section 271(d)(6). If the Commission disagrees with a state commission's actions, it can explain why it does in any order issued on appeal.

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17 *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).

18 *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 384 (1999) ("*Iowa II*").

19 Such a decision would be subject to Commission deference. Indeed, section 271 is silent regarding a state commissions authority in this regard and therefore a Commission decision to involve state commissions in the process, which the Commission has already done with respect to other 271 matters, is entitled to such deference. *Chevron*, 467 U.S. at 843.

3. The Commission's Recognition of State Authority Under Sections 251 and 271 Supports Having States Apply the Commission's Just and Reasonable Standard for 271 UNEs.

The Commission's findings regarding state authority that were articulated in the *TRO* are, as a matter of sound public policy and consistent recognition of state authority, applicable here and support state involvement. In particular, the Commission stated in the *TRO* that state commissions are not preempted from acting under 251(d)(3) so long as their actions "are consistent with the requirements of section 251 *and* do not 'substantially prevent' the implementation of the federal regulatory regime."[20] The Commission explained that state commissions must abide by and act consistent with its federal framework.[21] Although the Commission rendered this decision based on its interpretation of section 251(d)(3), uniform recognition of this authority under section 271 makes sense and harmonizes with the Commission's express request for and tremendous reliance on state commission involvement in the ratemaking and section 271 application and enforcement process.

B. The TRA Established a Just and Reasonable Rate for Switching.

As the June 24, 2004 transcript attached to BellSouth's Petition reveals, the TRA did nothing more than adopt an interim rate for the switching 271 UNE that is based on the Commission's just and reasonable pricing standard.[22] The TRA found that BellSouth did not offer a just and reasonable rate for the switching 271 UNE that applies to customers with four or more lines in the Top 50 MSAs. Based on the evidence that BellSouth presented, the TRA concluded that,

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20 *TRO*, ¶ 193.

21 *TRO*, ¶¶ 194-95.

22 *TRO*, ¶ 664 (emphasis added).

> BellSouth failed to demonstrate that its proposed final best offer, its 271 switching rate, is at or below the rate at which BellSouth offers comparable functions to similarly situated purchasing carriers under its interstate access tariff or that the 271 switching element final best offer is reasonable by showing that it has entered into arm's length agreements with other similarly situated purchasing carriers to provide an inclusive standalone switching at the rate proposed in the final best offer.[23]

The TRA further held that the interim switching rate proposed by ITC DeltaCom was just and reasonable[24] and that this rate would be subject to true-up based on a final rate that is established in a generic docket for switching outside of 251.[25]

Nothing the TRA did frustrates or thwarts the just and reasonable pricing standard that the Commission prescribed for 271 UNEs. The TRA did not order that the rate be TELRIC based nor did it order that rates be based on some other type of pricing standard. Rather, the TRA strictly applied the Commission's just and reasonable pricing standard. Because there is no inconsistency between the pricing standard that the TRA applied and what the Commission adopted, this decision is permissible by law and the Commission has no basis to preempt it.

II. The Commission Cannot Preempt States From Regulating Intrastate Services.

The Act recognizes dual state and federal regulation over telephone service in which the Commission regulates interstate communications and states regulate intrastate communications. With respect to involving itself in the regulation intrastate communications service, the Commission is generally barred from doing so. As discussed below, section 271 does not alter that dual regulatory scheme and does not strip state commissions of their authority to regulate intrastate services that include 271 UNEs. Nor does the Commission's adoption of the just and

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[23] Tennessee Regulatory Authority, Docket No. 03-00119, Transcript of Proceedings, June 21, 2004 at 4, lines 16-24 (attached as Exhibit E to BellSouth's Petition) .

[24] *Id.* at 4, lines 10-14.

[25] *Id.* at 8, lines 14-18.

reasonable standard associated with sections 201 and 202 (which normally only applies to interstate services) for 271 UNEs permit the Commission to exert exclusive interstate jurisdictional control over them.

A. Section 271 Does Not Alter the Dual Regulatory Scheme that Includes State Commission Involvement.

The Commission should reject BellSouth's request that state commissions are preempted from regulating under section 271 as a matter of law. As discussed previously, if Congress intended to preempt the field entirely, Congress would have done so explicitly. Indeed, if that were the case, Congress would not have included section 271(d)(6) in the Act and state commissions would not play a critical role in the section 271 process. Because of this and as explained below, preempting states from applying the Commission's just and reasonable standard in establishing rates, terms and conditions for 271 UNEs would be unlawful since the Commission does not have exclusive jurisdictional control over 271 UNEs.

To elaborate, the Communications Act of 1934 establishes "a system of dual state and federal regulation over telephone service,"[26] under which the Commission has the power to regulate "interstate and foreign commerce in wire and radio communication."[27] The Commission is generally forbidden from entering the field of intrastate communication service, which remains the province of the states.[28]

While the apportionment of regulatory power in this dual system is, of course, subject to revision, whether the Commission may preempt state regulation of intrastate telephone service

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[26] *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 360 (1986).

[27] 47 U.S.C. § 151.

[28] *See Louisiana Pub. Serv. Comm'n,* 476 U.S. at 360; *see also Illinois Pub. Telecomms. Ass'n v. FCC,* 117 F.3d 555, 561 (D.C. Cir. 1997); *see also City of Brookings Mun. Tel. Co. v. FCC,* 822 F.2d 1153, 1155 (D.C.Cir.1987) ("[T]he FCC enjoys jurisdiction over interstate rates, whereas the several States reign supreme over intrastate rates.").

depends, as in "any pre-emption analysis," on "whether Congress intended that federal regulation supersede state law."[29] There are six circumstances where federal preemption of state law can occur: (1) Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law; (2) there is outright or actual conflict between federal and state law; (3) compliance with both federal and state law is in effect physically impossible; (4) implicit in federal law is a barrier to state regulation; (5) Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law; or (6) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[30] "Where ... the field that Congress is said to have pre-empted has been traditionally occupied by the States we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[31]

The United States Supreme Court has found that the "best way" to determine if there is preemption "is to examine the nature and scope of the authority granted by Congress to the agency."[32] In cases involving the Communications Act, that inquiry is guided by the language of section 152(b),[33] which the Supreme Court has interpreted as "not only a substantive

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29 *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369.

30 *Id.* at 368-69.

31 *New York & Public Service Com'n of New York v. FCC*, 267 F.3d 91, 101 (2nd Cir. 2001) (citing *Hillsborough County, Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 715 (1985) (internal quotation marks and citations omitted)).

32 *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

33 Section 152(b) of the Communications Act provides,

> Except as provided in sections 223 through 227..., inclusive, and section 332 ..., and subject to the provisions of section 301 of this title..., *nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to ...charges, classifications, practices, services facilities, or regulations for or in connection with intrastate communications service...."*

47 U.S.C. § 152(b) (emphasis added).

jurisdictional limitation on the Commission's power, but also a rule of statutory construction."[34] For instance, in applying this test in a challenge to the Commission's authority under section 276 of the Act, courts have held that special provisions concerning BOCs "should not be read to confer upon the FCC jurisdiction" unless such provisions are "so *unambiguous or straightforward* so as to override the command of § 152(b)."[35]

In *New England Public Comm. Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) ("*New England Public Comm. Council*"), the Court found that section 276 "unambiguously and straightforwardly" grants the Commission the authority to regulate the BOCs' intrastate payphone line rates. The Court noted that "Section 276(b) directs the Commission to implement section 276(a)'s anti-subsidy and anti-discrimination mandates by undertaking five specific measures to promote 'competition among payphone service providers and ... the widespread deployment of payphone services to the benefit of the general public.'"[36] The Court stated that "Recognizing that the Commission's regulations implementing these commands would tread on ground traditionally occupied by the states, Congress included a preemption clause providing that '[t]o the extent that any State requirements are inconsistent with the Commission's regulations,' the Commission's regulations would preempt state law."[37] The Court further held that,

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[34] *Id.* at 373.

[35] *Illinois Pub. Telecomms. Ass'n,* 117 F.3d at 561 (emphasis added, internal quotation marks omitted) (citing *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 377).

[36] *New England Public Comm. Council*, 334 F.3d at 75-76 (citing 47 U.S.C. § 276(b)(1)).

[37] *Id.* at 76 (citing 47 U.S.C. § 276(c); *see also* S.Rep. No. 104-230, at 158 (1996) ("In crafting implementing rules, the commission is not bound to adhere to existing mechanisms or procedures established for general regulatory purposes in other provisions of the Communications Act [of 1934].")).

> Two of the five measures prescribed in section 276(b), moreover, expressly apply to intrastate service: subsection (b)(1)(A) directs the Commission to adopt regulations guaranteeing fair compensation for "*intrastate* and interstate call[s]," 47 U.S.C. § 276(b)(1)(A) (emphasis added), and (b)(1)(B) requires the Commission to "discontinue the *intrastate* and interstate carrier access charge payphone service elements ... and all *intrastate* and interstate payphone subsidies," *id.* § 276(b)(1)(B) (emphasis added). In fact, we have interpreted subsection (b)(1)(A) to permit Commission regulation of local coin rates, which was long the exclusive domain of the states. *Illinois Pub. Telecomms. Ass'n,* 117 F.3d at 561-63. And although subsections (b)(1)(D) and (b)(1)(E) do not use the word "intrastate," the two provisions authorize the Commission to promulgate regulations concerning PSPs' selection of carriers for long-distance intraLATA and interLATA calls, both of which are often intrastate calls. *See* 47 U.S.C. § 276(b)(1)(D), (b)(1)(E). As the BOCs affirm, "the FCC could not carry out this mandate without addressing intrastate matters." BOC Petitioners' Br. at 12-13. All of these provisions, which authorize the Commission to regulate both intrastate and interstate service in implementing section 276(a)'s anti-subsidy and anti-discrimination commands, indicate that those commands, too, apply to both intrastate and interstate matters.[38]

In *New York & Public Service Com'n of New York v. FCC,* 267 F.3d 91, 102 (2nd Cir. 2001) ("*New York*"), the court held that section 251(e) grants the Commission authority to act with respect to those areas of intrastate service associated with the North American Numbering Plan and its administration.[39] The court found that this explicit grant of authority provides the requisite "unambiguous and straightforward" evidence of Congress's intent to "override the command of § 152(b) that 'nothing in this chapter shall be construed to apply or to give the Commission jurisdiction over intrastate service."[40]

Unlike sections 276(b) and 251(e) of the Act, section 271 does not "unambiguously and straightforwardly" grant the Commission the sole authority to establish rates, terms and conditions for 271 UNEs. Nor does section 271 have a specific provision similar to 276(e) that

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38 *Id.* at 76.

39 *New York,* 267 F.3d at 102 (citing 47 U.S.C. § 251(e)).

40 *Id.* (quoting *La. Pub. Serv. Comm'n,* 476 U.S. at 377, 106 S.Ct. 1890.).

expressly states that Commission regulations preempt inconsistent state commission decisions. Therefore, consistent with the *New England Public Comm. Council* and *New York* decisions, it would unlawful for the Commission to preempt state commissions from exercising their section 152(b) authority and regulate 271 UNEs because nothing in section 271 unambiguously and straightforwardly prohibits states from doing so.

If anything, section 261(c) of the Act specifically permits state commissions to exercise their intrastate authority in a manner that is consistent with the federal regulatory scheme. Section 261(c) specifically provides:

> (c) Additional State Requirements. - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.[41]

With this authority, state commissions can further local telecommunications competition as section 271 contemplates and establish intrastate rules that track a BOC's obligations under section 271. Such authority includes ordering just and reasonable rates, terms, and conditions associated with offering 271 UNEs.

Furthermore, the United States Supreme Court's decision in *Iowa II* supports a determination that no preemption in this instance exists so long as state commissions apply the Commission's just and reasonable standard. Indeed, the Supreme Court found parallel federal and state jurisdiction under 252 and held that the Commission had the authority to create a pricing methodology that states would apply. In rendering this decision, the Supreme Court endorsed having state commissions continue playing their significant role in the ratemaking

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[41] 47 U.S.C. § 261(c).

process.[42] The Supreme Court explained that "state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations" and that "States will be allowed to do there own thing", however, they must "hew" the lines drawn by the FCC or federal courts.[43] Although section 271, unlike section 252, does not specify state commission involvement in establishing rates for 271 UNEs, it does not preclude state commissions from applying the Commission's pricing standard when establishing such rates.

For the above reasons, the Act and numerous judicial decisions support having dual federal and state jurisdiction whereby state commissions apply the Commission's just and reasonable standard for 271 UNEs. Because of this, the Commission may not alter or disrupt this dual regulatory scheme.

B. The Commission May Not Rely on Section 201 to Preempt the States

BellSouth unpersuasively argues that the Commission has exclusive jurisdiction to regulate 271 UNEs because the Commission is applying the section 201 and 202 just and reasonable pricing standard to them.[44] The Commission's application of this standard on 271 UNEs does not at all mean that the Commission, pursuant to section 201, has exclusive jurisdiction over 271 UNEs and that it may preempt state commission action over them.

The Commission's exclusive section 201 jurisdiction only applies to interstate services. In particular, Congress granted the Commission with exclusive jurisdiction over "*all* interstate and foreign communication by wire or radio."[45] Thereafter, Congress developed a

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[42] *Iowa II*, 525 U.S. at 384.

[43] *Id.*, 525 U.S. at 378 n.6.

[44] BellSouth Petition at 10.

[45] 47 U.S.C. § 152(a) (emphasis added).

comprehensive statutory scheme for exclusive Commission oversight of the filing and enforcement of tariffs and prices for such interstate services.[46] State commissions, therefore, have no authority to regulate prices for interstate telecommunications services.[47]

Section 271 UNEs, however, are not interstate services but are local exchange offerings. In fact, section 271(c)(2)(B)(iv)-(vi) specifically characterizes the 271 loop, transport, and switching as "local" facilities. Therefore, because they are not interstate services, they are not within the Commission's exclusive control pursuant to section 201.

Although the Commission may have had the authority to apply the sections 201and 202 just and reasonable standard to 271 UNEs, it does not have the authority to strip state commission's of their local intrastate authority over 271 UNEs. The *Iowa II* decision fully supports this limitation of authority. There the Supreme Court found that 201(a) does not reach "forward into the last sentence of § 201(b) to limit the class of provisions that the Commission has the authority to implement."[48] Rather, the Supreme Court stated that "201(b) means what it says: The FCC has the rulemaking authority to carry out the 'provisions of this Act.'"[49] This "rulemaking authority" does not permit the Commission to usurp a state's intrastate authority and right to regulate 271 UNEs - which are local intrastate services - in a manner that is consistent with the "rules" established by the Commission.

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[46] *See* 47 U.S.C. §§ 201-208.

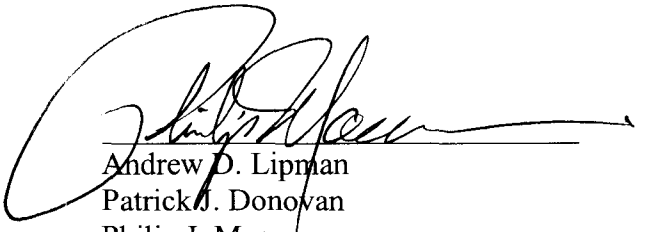
[47] *See National Ass'n of Regulatory Utility Commissioners v. Federal Communication Comm'n,* 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("[i]nterstate communications are totally entrusted to the FCC"); *Ivy Broadcasting Co. v. AT & T Co.,* 391 F.2d 486, 491 (2d Cir. 1968) ("questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and the states are precluded from acting in this area").

[48] *Iowa II,* 525 U.S. at 378.

[49] *Id.* (emphasis added).

CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's Petition and hold that state commissions have the authority to establish rates, terms and conditions for 271 UNEs that are consistent with the Commission's just and reasonable standard. The Commission should accordingly not preempt the order of the TRA.



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